In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY JOE WADE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH [redacted] CIRCUIT

The Acting Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit reversing respondent's conviction for conspiring to rob, and for robbing, a federally insured bank.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 11–18) is reported at 358 F. 2d 557.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1966 (App. B, *infra*, p. 19). A petition for rehearing *en banc* was denied on May 11, 1966 (App. C, *infra*, p. 21). By order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari was extended to and including July

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11, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the fact that a lineup (at which participants were asked to utter a specified sentence) was conducted after indictment and without notification to respondent's counsel required exclusion of the courtroom identification of respondent by witnesses who had identified respondent at the lineup.

STATEMENT

Respondent was convicted by a jury in the United States District Court for the Eastern District of Texas under a two-count indictment charging that he conspired to rob, and did rob, a federally insured bank in Eustace, Texas, in violation of 18 U.S.C. 371 and 2113 (a) and (d). He was sentenced to imprisonment for five years on the conspiracy count and for fourteen years on the robbery count, the sentences to run concurrently. The court of appeals reversed, one judge dissenting.

The evidence showed that a bank in Eustace, Texas, was robbed on September 21, 1964. While one man waited outside in a parked automobile, another man, with a small strip of tape on each side of his face, entered the bank, trained a pistol on the two employees, handed them a pillow case, and ordered them to fill it with currency. The two employees complied and the robber then fled with his accomplice in the waiting car.

In February and March, 1965, two men who had pleaded guilty and had been sentenced for the robbery

of a San Antonio bank, but who had previously denied robbing the Eustace bank, gave written statements to F.B.I. agents acknowledging their complicity in the Eustace robbery. They named respondent as a third participant and as the one who had actually entered the bank. An indictment against respondent was returned on March 23, 1965. Respondent was arrested on April 2, 1965, and on April 26 an attorney was appointed to represent him. On May 12, without notice to respondent's appointed counsel, respondent and six other prisoners were taken from their jail cells for the purpose of appearing in a lineup before the two bank employees who had witnessed the robbery. Before the prisoners entered the room in which the lineup was to be held, one of the two bank employees, who was then in the room, observed through an open door that respondent was standing in the hallway (R. 235–240).[1] The other employee, through the same open door, was able to see respondent and also a man whom he knew to be an F.B.I. agent (R. 252–256). The prisoners, including respondent, were then brought into the room. All wore tape on their faces as had the robber of the bank. Each was asked to repeat the phrase, "Put the money in this bag."[2] The two employees identified respondent as the man who had committed the robbery (R. 238, 249).

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[1] "R." refers to the typewritten transcript of the trial proceedings.

[2] The fact that the prisoners were asked to repeat words does not appear in the record. It was disclosed by government counsel on oral argument before the court of appeals, and was considered by a majority of the panel in order to remove the fact "as a possible basis for the filing of a petition for post conviction review at a later date" (App. A, *infra*, p. 13).

At the trial, one of the two accomplices whose confessions had led the F.B.I. to respondent testified that he had helped plan the robbery with respondent and the other accomplice, but that he had decided not to participate in its execution since he was well known in the area. The other accomplice testified that he was the one who had driven the automobile involved and that respondent was the one who entered the bank. The two bank employees then described the robbery and identified respondent as the man who had taken the money at gunpoint (R. 219, 247). On cross-examination of the first employee to testify, defense counsel elicited, for the first time, the fact that the witness had identified respondent at a lineup, and that prior to the lineup she had seen respondent through an open door (R. 235–240). Defense counsel also elicited the fact that, at some time between the robbery and the lineup, the witness had picked respondent's picture out of a series of photographs and identified it as depicting the robber (R. 231–232). Thereafter, on direct examination of the second employee, the lineup identification was again brought out (R. 249). Cross-examination of the second employee was concentrated on his pre-lineup observation of respondent and the agent through the open door (R. 252–256). Re-direct examination established that the employee had no doubt in his mind that respondent was the robber (R. 258). After the close of all the evidence, defense counsel moved for a judgment of acquittal on the ground that the conduct of the lineup without notice to respondent's attorney was in violation of respondent's constitutional rights. Alternatively he moved

to strike the identifying testimony of the two bank employees (R. 266). The motions were denied.

On appeal, the court of appeals, one judge dissenting, reversed the conviction on the ground that the post-indictment lineup in the absence of respondent's appointed counsel violated respondent's Sixth Amendment rights. The majority expressly adopted the view of the dissenting judges in *United States ex rel. Stovall* v. *Denno*, 355 F. 2d 731 (C.A. 2, *en banc*), that a defendant is entitled to the assistance of counsel when the government "wishes to make use of him to obtain evidence that will have independent testimonial value" (App. A, *infra*, p. 15).[3] The majority also postulated that, had counsel been present in this case, he might have instructed respondent not to make the verbal responses requested for voice identification, and also might have prevented the situation whereby the bank employees saw respondent before the lineup took place. In the circumstances, the majority found the "illegal procedure" might well have prejudicially colored the bank employees' courtroom identification. The majority concluded that reversal was required, and that in the event of a new trial "the evidence of the two bank witnesses, following the occurrence that

[3] The *Stovall* decision stated that placing a defendant in a lineup for identification did not violate his Fifth Amendment rights, and the majority here found "no reason to express a contrary conclusion so far as relates to the ordinary police lineup" carried out fairly (App. A, *infra*, p. 14). The majority then stated that, since it was adopting the reasoning of the *Stovall* dissent, it need not resolve the question whether there was a violation of fair lineup procedures in this case (App. A, *infra*, p. 15).

we have held to have violated Wade's rights, must be omitted" (App. A, *infra* p. 17).

REASONS FOR GRANTING THE WRIT

1. In two cases arising out of State criminal proceedings (*United States ex rel. Stovall* v. *Denno*, No. 254, *Gilbert* v. *California*, No. 223, this Term), this Court will soon have occasion to consider the extent, if any, to which the Sixth Amendment has application to the conduct of a lineup or similar identification procedure. Presumably those cases will provide a definitive answer to that question in the circumstances of this case.

The instant case presents a further question of potential importance—whether the court below went to impermissible lengths in fashioning and applying a novel exclusionary rule, should the Sixth Amendment apply.

Even assuming that the manner in which the lineup was conducted here is subject to criticism, the relief granted by the Fifth Circuit goes far beyond any prior decision. The Fifth Circuit has declared that at a new trial the testimony of the bank employees must be omitted—on the theory that the circumstances under which they identified respondent at the lineup must have colored their identification in court. Such a rule would mean that, no matter how long and clearly a witness saw a defendant at the time of the crime, he could not testify if an improper lineup intervened before trial. In this case, for example, the rule ignores the fact that one of the observing witnesses had picked respondent's photograph from a group shown to her prior to the lineup.

The rule promulgated by the Fifth Circuit goes far beyond the view of the dissenters in *Stovall*. They would require only that the government rest on the courtroom identification of a defendant, and not employ the earlier identification to bolster the testimony. They noted that if defense counsel had brought out the previous identification, "as no experienced counsel would, he would have had only himself to blame" (355 F. 2d at 745). (Here, indeed, it was the defense which originally brought out the lineup identification at trial.) To say that witnesses could not testify to what they saw at the time of the crime and to their recognition of respondent in the courtroom is thus to extend the exclusionary rule to extraordinary lengths.

2. Should the decisions in Nos. 254 and 223 fail to resolve for this case the question whether the conduct of a lineup or similar identification procedure without participation by counsel is a deprivation of constitutional right, we wish to reserve the privilege of arguing that aspect of the question presented above. We of course recognize that in pretrial, non-judicial contacts between government officials and an accused, counsel may serve as a safeguard against possible infringement of the accused's privilege against compulsory self-incrimination. See *Miranda* v. *Arizona*, slip opinion, pp. 33–34, decided June 13, 1966, Nos. 759, 760, 761, 584, O.T. 1965. The privilege, however, covers only testimonial relevations, not exposure to view by witnesses to the offense. *Schmerber* v. *California*, decided June 20, 1966, No. 658, O.T. 1965; *Holt* v. *United States*, 218 U.S. 245, 252–253. The necessity

of counsel in the situation typified by a police lineup therefore presents a quite different question. There is surely a long step between the right to counsel in the criminal trial itself and the asserted right to have counsel present during the conduct of investigative procedures which involve no infringement of the Fifth Amendment privilege. See *Williams* v. *United States*, 345 F. 2d 733 (C.A.D.C.).[4]

[4] In holding that the absence of counsel was prejudicial in this case, the Fifth Circuit stated that counsel could have instructed respondent "to remain silent and not make the verbal responses required of him by the prosecutor". (App. A., *infra*, p. 15). This incorrectly presupposes the applicability of the privilege. The fact that respondent here was asked to repeat a phrase does not automatically make what he said testimonial; on the contrary, courts have generally treated similar procedures as the display of a physical characteristic—rather than an extraction of the defendant's knowledge—and hence not within the protection of the privilege. *Rigney* v. *Hendrick*, 355 F. 2d 710, 714 (C.A. 3); *State* v. *King*, 44 N.J. 346, 357, 209 A. 2d 110 (1965); *People* v. *Lopez*, 60 Cal. 2d 223, 244, 384 P. 2d 16, certiorari denied, 375 U.S. 994 (1964); *State* v. *Freeman*, 408 P. 2d 612, 616 (Kan., 1965); *Boyer* v. *State*, 182 So. 2d 19 (Fla., 1966); *Dyson* v. *State*, 238 Md. 398, 209 A. 2d 609 (1965); Note, 24 Ind. L. Jour. 587 (1949); 8 Wigmore, *Evidence*, § 2265 at p. 396 (McNaughton rev., 1961); McCormick, *Evidence*, § 126 at p. 266 (1954). The fact that "federal and state courts have usually held that [the privilege] offers no protection against compulsion * * * to write or speak for identification * * * to assume a stance * * * or to make a particular gesture" was also noted by this Court in *Schmerber* in holding that the Fifth Amendment protects only against "the compulsion of responses which are also communications" (Slip Op., pp. 6-7).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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*The Solicitor General has disqualified himself because of his participation in the original decision of the Second Circuit in the *Stovall* case.

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